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Supreme Court, U.S.
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No. 95-717

IN THE
Supreme Court of the United States

OCTOBER TERM, 1995

THOMAS MAHALEK
Petitioner,

v.

KOREAN AIR LINES, CO., LTD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT.

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. Must a surviving sibling prove that they were financially dependent on a decedent in order to recover damages for loss of society under the Warsaw Convention?

Table of Contents.

Question presented for review	i
Table of authorities cited	ii
Opinions below	1
Jurisdiction	2
Statutory provisions involved	2
Statement	2
Summary of the argument	5
Argument	6
I. Certiorari should be granted because of the close relationship of the question raised to the question presented in *Zicherman v. Korean Air Lines, Co.*	6
II. Certiorari should be granted to resolve conflicting opinions on recovery for loss of society damages	7
III. Cases pending across the country await definite ruling on damages recoverable under the Warsaw Convention	9
Conclusion	10

Table of Authorities Cited.

CASES.

Anderson v. Whittaker Corp., 894 F.2d 804 (1990)	8
In re Korean Air Lines Disaster of September 1, 1983 575 F.Supp 342 (J.P.M.D.L. 1983).	3

TABLE OF AUTHORITIES CITED (CONT'D)

In re Korean Air Lines Disaster of September 1, 1983 807 F.Supp. 1073 (S.D.N.Y. 1992) 3

Pagnucco et al. v. Pan American World Airways, Inc, ____ F.3d ____ (Nos. 1280, 1281, 1282, 1994) 10

Porter v. Dicken, 328 U.S. 252 (1946) 7

Porter v. Lee, 328 U.S. 246 (1946) 7

Sea-Land Services, Inc v. Gaudet, 414 U.S. 573 (1974) 8

Sistrunk v. Circle Bar Drilling Co., 770 F.2d 455 (1985). 8

Sutton v. Earles, 26 F.3d 903 (9th Cir. 1994) 5, 7, 8

Taylor v. McElroy, 358 U.S. 918 (1958), 360 U.S. 709 (1959) 7

Wahlstrom v. Kawasaki Heavy Indus., Ltd., 4 F.3d 1084 (1993) 6

Zicherman v. Korean Air Lines, Co., 43 F.3d 18 (2nd Cir. 1994) 4, 6

Zicherman v. Korean Air Lines, Co., 1994 WL 606516 (2nd Cir. N.Y. November 3, 1994) 4

Zicherman v. Korean Air Lines, Co., S.Ct. 1995 (115 S.Ct. 1689) 5

STATUTES AND RULES.

United States Code

28 U.S.C. § 2101(e) 2
28 U.S.C. § 1254(1) 2
49 U.S. C. § 1502 2

No.

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THOMAS MAHALEK
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KOREAN AIR LINES, CO., LTD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

PETITION FOR WRIT OF CERTIORARI

Thomas Mahalek respectfully petitions for a writ of certiorari to review the judgment of the United States District Court for the Northern District of California.

OPINIONS BELOW

The court of appeals has not rendered an opinion. The opinion of the district court (App., *infra*, A1) is unreported. The amended opinion of the district court (App., *infra*, A2) is unreported.

JURISDICTION

Notice of Appeal was filed March 24, 1995. Appeal was properly docketed by the Ninth Circuit on March 28, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) and 28 U.S.C. §2101(e). Petitioner seeks review of the case below before judgment has been entered in the Court of Appeals. The case below is of imperative public importance and requires immediate settlement in this Court.

PROVISION OF LAW INVOLVED

This case raises the interpretation of Article 17 of The Warsaw Convention, known formally as the Convention for Unification of Certain Rules Relating to International Transportation by Air, 49 Stat. 3000, T.S. No. 876 (1934) *reprinted in* 49 U.S.C. §1502 note.

WARSAW CONVENTION ARTICLE 17

"The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking."

STATEMENT OF THE CASE

Korean Air Lines Flight 007 strayed into Soviet airspace and was shot down on September 1, 1983. All those aboard perished. Among the passengers was Muriel A.M.S. Kole, whose brother, Thomas Mahalek ("Mahalek"), is the Petitioner before this Court.

The Petitioner filed suit against Korean Air Lines Co., Ltd. ("KAL") in the Northern District of California. Along with all other federal court actions arising out of the KAL tragedy, the Petitioner's case was transferred to the United States District Court for the District of Columbia for consolidated proceedings on the question of liability. *See In re Korean Air Lines Disaster of September 1, 1983*, 575 F.Supp. 342 (J.P.M.D.L. 1983).

Following a jury trial, KAL was found liable for "wilful misconduct" in connection with the Flight 009 tragedy. Under Article 25 of the Warsaw Convention, KAL therefore could not invoke the $75,000.00 cap on damages that would otherwise be available. The Petitioner's case was then remanded to the district court for a damages trial.[1]

Before a jury was empaneled to assess damages against KAL, the district court ruled it would follow Judge Motley's ruling as set forth in *In re Korean Air Lines Disaster of September 1, 1983*, with respect to the applicable damage law, and that Petitioner could recover for the loss of the decedent's society, and for mental injury he suffered in the aftermath of the tragedy.[2] *See* 807 F.Supp. at 1084-1088. The district court did not require that the Petitioner prove he was financially dependent on the decedent in order to recover damages for loss of society.

After hearing evidence, the jury awarded damages to the Petitioner as follows:

1. Loss of society $ 75,000

The District Court entered final judgment. (App., *infra*, A1) Pending before the District Court were Petitioner's Motion for

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[1]In the interests of brevity, some of the steps along the way of the complex multi-district proceedings have been omitted.

[2]Petitioner is not seeking review of this element of damages.

Prejudgment Interest and Bill of Costs, and KAL's Motion for Judgment as a Matter of Law.

Shortly thereafter, KAL filed a Motion to Vacate and Set Aside the Liability Judgment; Petitioner's action was re-transferred to the District of Columbia. KAL's Motion to Vacate and Set Aside the Liability Judgment was denied, and Petitioner's action was remanded back to the damage trial court. Seventeen months after entering judgment, the District Court granted KAL's Motion for Judgment as a Matter of Law, and issued an Amended Judgment, (App., *infra*, A2) Vacating the Jury Verdict. Petitioner's Appeal of the Amended Judgment is now pending in the Court of Appeals for the Ninth Circuit.

In a companion action, *Zicherman v. Korean Air Lines, Co.*, 43 F.3d 18 (1994), Marjorie Zicherman, sister and Muriel Mahalek, mother of decedent Muriel A.M.S. Kole, filed suit against KAL in the Southern District of New York. Each Petitioner sought recovery in her individual capacity, and Zicherman also sued as personal representative of her sister's estate. After hearing evidence, the jury awarded damages to the Plaintiffs which included damages for loss of society and mental injury. The district court computed prejudgment interest, and entered final judgment.

KAL noticed an appeal from the district court's final judgment, contesting all of the damages awarded on both legal and factual grounds. In an opinion dated November 3, 1994, 1994 WL 606516 (2nd Cir. N.Y.) the Second Circuit affirmed the District Court's judgment, with two important exceptions:

1. The Second Circuit ruled that damages for loss of society cannot be recovered under the Warsaw Convention unless the surviving relative was financially dependent on the decedent;

2. The Second Circuit also ruled that damages for mental injury are not recoverable under the Warsaw Convention under

any circumstances.

Because the jury had not been instructed that financial dependency was a prerequisite to recovery for loss of society, the Second Circuit examined the record for evidence of financial dependency. It found that Mahalek was not financially dependent on her daughter, and accordingly vacated all of the damages that Mahalek had been awarded. As to Zicherman, the Second Circuit found some evidence of financial dependency, and therefore remanded the case back to the District Court for a determination on this narrow question. The mental injury to Zicherman was vacated.

After the Second Circuit issued its November 3 opinion, KAL petitioned for a rehearing. On December 5, 1994, the Second Circuit withdrew its initial opinion, and filed an amended opinion. In the amended opinion, the Second Circuit ruled that the jury's awards for loss of support and loss of inheritance were also subject to a financial dependency requirement. These two awards were therefore vacated, pending further proceedings in the District Court.

Zicherman and Mahalek petitioned this Court for a writ of certiorari which was granted on April 17, 1995 (115 S.Ct. 1689.)

REASONS FOR GRANTING THE PETITION

The decision below is erroneous and the issue that it addresses is important. The decision in this case conflicts with *Sutton v. Earles*, 26 F.3d 903 (9th Cir. 1994). *Sutton*, conflicts with the Second Circuit's decisions in *Zicherman v. Korean Air Lines, Co., supra*, and *Wahlstrom v. Kawasaki Heavy Indus., Ltd.*, 4 F.3d 1084 (1993). At both the circuit court and district court level conflicting decisions have occurred. There are a multitude of cases involving the same issue that are waiting to be tried and are in need of guidance from this Court. This case, along with *Zicherman* which is now pending before this Court, is a timely and rare

opportunity to provide that guidance.

1. The case below arises out of the same event and involves the same decedent as the *Zicherman* case which is presently before this Court on writ of certiorari.

2. The opinion below raises important legal questions identical to the questions presented in *Zicherman v. Korean Air Lines, Co.*, 43 F.3d 903 (2nd Cir. 1994), which is presently pending before this Court.

3. A conflict exists among district courts and circuit courts as to whether federal damage law requires a showing of financial dependency in order to recover loss of society damages. By imposing a financial dependency requirement, the district court's and Second Circuit's ruling unduly restricts recovery. By adopting a cruel and irrational rule of law, one that is particularly inappropriate under the unique structure of the Warsaw Convention, it affords an unconscionable degree of economic protection to the airline industry where a carrier has been found liable for egregious, wilful misconduct.

4. Numerous cases arising from the KAL tragedy and the disaster at Lockerbie, Scotland are pending in Courts of Appeal and District Courts around the country. This Court should provide definitive guidance on the elements of damages recoverable under the Warsaw Convention to prevent conflicting and inconsistent results.

ARGUMENT

I. CERTIORARI SHOULD BE GRANTED BEFORE JUDGMENT BELOW BECAUSE OF THE CLOSE RELATIONSHIP OF THE QUESTION RAISED TO THE QUESTION PRESENTED IN *ZICHERMAN V. KOREAN AIR LINES, CO.*

The case below presents a question identical to the question presented in *Zicherman v. Korean Air Lines, Co.*, 43 F.3d 18 (2nd Cir 1994). This Court granted certiorari in the

Zicherman case on April 17, 1995. (115 S.Ct 1689). Petitioner in the case below, Thomas Mahalek, is brother to the Petitioners in *Zicherman*.

This Court has granted certiorari where a petition for certiorari presents a question that is identical with, or similar to, an issue already pending before this Court in another case in which certiorari has been granted. *See, Taylor v. McElroy*, 358 U.S. 918 (1958), 360 U.S. 709, 710 (1959). *See also Porter v. Dicken*, 328 U.S. 252, 254 (1946) (certiorari was granted before judgment below "by reason of the close relationship of the important question raised to the question presented in *Porter v. Lee*" (328 U.S. 246 (1946))).

The District Court followed the rule embraced by the Second Circuit: financial dependency is required to recover loss of society damages under general maritime law, although the Ninth Circuit has reached the opposite result in *Sutton v. Earles*, 26 F.3d 903 (1994). Petitioner's case is currently before the court of appeals for the Ninth Circuit.

There exists a conflict between the circuits on this issue. This Court should grant Thomas Mahalek's Petition to allow Petitioner to argue directly before this Court, to resolve a matter of great importance and to correct the District Court's error.

II. CERTIORARI SHOULD BE GRANTED TO RESOLVE CONFLICTING OPINIONS ON RECOVERY FOR LOSS OF SOCIETY DAMAGES.

The District Court followed Second Circuit precedent which drew exclusively on general federal maritime law to decide what damages are recoverable under the Warsaw Convention. The Second Circuit then followed those Circuit Courts of Appeal that imposed a financial dependency requirement for loss of society damages under general

maritime law. *See, e.g., Anderson v. Whittaker Corp.*, 894 F.2d 804, 811-12 (6th Cir. 1990); *Sistrunk v. Circle Bar Drilling Co.*, 770 F.2d 455 (5th Cir. 1985). The Second Circuit recognized, however, that the Ninth Circuit has reached the opposite result; the Ninth Circuit ruled that there is no need to establish financial dependency. *Su .on v. Earles*, 26 F.3d 903, 914-17 (9th Cir. 1994).

Although the Second Circuit's position is followed by other circuits, the rule espoused by the Ninth Circuit is more sensible, and should be adopted. Financial dependency has no rational relationship of any kind to loss of society, and it is intolerable and inhumane to suggest otherwise. A brother's loss of love and affection for his sister, as well as a parent's loss of a child will more often times occur in the absence of financial dependency. In the case below, there was ample evidence of Mahalek's loss. Mahalek did not look to his sister for financial support; as a result, the jury's finding of his loss is somehow deemed irrelevant. Had he been less self-sufficient, and insisted on support from the decedent, he would have been allowed to recover. This is an absurd result, and does not comport with any sense of justice or decency and it must not stand. More aptly stated; money should not be a prerequisite to love.

This Court has recognized that, at least for federal general maritime wrongful death actions, loss of society is recoverable. *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573 (1974). Although the issue of financial dependency was not raised under the facts of *Gaudet*, imposing a dependency requirement is inconsistent with this Court's definition of "society" as embracing a broad range of mutual benefits *each family member* receives from the others' continued existence, including love, affection, care, attention, companionship, comfort, and protection. 414 U.S. at 585 (emphasis added).

It must also be remembered that the case below was not a maritime case *per se*, but rather a Warsaw Convention case.

Although the Second Circuit drew on maritime law for some guidance in construing the Convention, it failed to take note of one special feature not found in maritime law: the damage cap. In the vast majority of international aviation accidents, Article 25 of the Warsaw Convention limits the air carrier liability to $75,000.00 per passenger. This is a tremendous economic advantage for the aviation industry, one that the shipping industry does not have. As a result, in the rare case of wilful misconduct, it is in conflict with the Convention itself to further limit liability by imposing the additional barrier of financial dependency as a prerequisite to loss of society damages.[3]

III. CASES PENDING ACROSS THE COUNTRY AWAIT A DEFINITE RULING ON DAMAGES RECOVERABLE UNDER THE WARSAW CONVENTION.

There are currently at least 31 pending cases arising out of the KAL tragedy that have not yet had a jury trial to assess damages. In addition, KAL has appeals of damage verdicts which are pending in the Second, Sixth and Ninth Circuit Courts of Appeal, as well as the District of Columbia Circuit Court of Appeals. Given the uncertainty over the elements of damages recoverable under the Warsaw Convention, the risk of inconsistent treatment of similarly situated plaintiffs is great.

It should also be noted that the bombing of Pan American flight 103 over Lockerbie, Scotland, led to a finding of wilful

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[3]For these reasons, awards for loss of support and loss of inheritance should also be unfettered by a financial dependency requirement.

misconduct by the defendant airline. *See Pagnucco et al. v. Pan American World Airways, Inc.* _____ F.3d ____ (Nos. 1280, 1281, 1282, 2d. Cir., 1994) There have been two damage trials already and there are scores of damages cases waiting to be tried in the aftermath of the *Lockerbie* decision. These cases also await definitive guidance from this Court on the damages available under the Convention. In sum, the authorities are in considerable disagreement on a matter of importance to the courts, to Thomas Mahalek, and to many other parties who are similarly situated. This case presents this Court with the opportunity to resolve a conflict among district courts and circuit courts and to bring uniformity to this area of law. Therefore, the Court should grant the petition.

CONCLUSION

Certiorari should be granted to review the decision below.

Respectfully submitted,

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Appendix Table of Contents.

Appendix A
Judgment on Jury Verdict A1

Appendix B
Order Vacating Judgment on Jury Verdict A2

Appendix C
Exhibit A to Reply of Korean Air Lines Co., Ltd. to Plaintiff's Supplemental Memorandum of Points and Authorities in Opposition to Motion for Judgment as a Matter of Law A6

Appendix D
Notice of Appeal A9

Appendix E
Assignment of Docket Number, Ninth Circuit Court of Appeals A10

Appendix F
Request for Voluntary Dismissal A12

Appendix G
Order Granting Motion for Voluntary Dismissal A13

APPENDIX A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

THOMAS L. MAHALEK, individually and as the heir of MURIEL KOLE,

Plaintiff,

vs.

KOREAN AIRLINES, CO., LTD.

Defendant.

C-83-4381 WHO

JUDGMENT ON JURY VERDICT

This action having come on for trial before the Court and a jury, the Honorable William H. Orrick, District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

IT IS ORDERED AND ADJUDGED that:

1. Plaintiff, Thomas L. Mahalek, suffered mental anguish and grief as a result of the death of Muriel Kole.

2. Plaintiff's mental anguish and grief did not result in actual mental injury accompanied by physical manifestations or aggravation of preexisting physical conditions that physically debilitated him with grief.

3. The amount of loss of love, affection and companionship that plaintiff has suffered (a) from September 1, 1983, to date of trial is $75,000; and (b) from date of trial forward is zero.

Dated: October 28, 1993.

William H. Orrick
United States District Judge

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

THOMAS L. MAHALEK, individually and as the heir of MURIEL KOLE, C-83-4381 WHO

Plaintiff,

vs.

KOREAN AIRLINES, CO., LTD.

Defendant.

ORDER

Pending before this Court are plaintiff Thomas L. Mahalek's ("Mahalek") motions for prejudgment interest and costs and defendant Korean Air Lines Co.'s ("KAL") motion for judgment as a matter of law. The Court having considered the briefs of both parties, GRANTS KAL's motion for judgment as a matter of law and DENIES Mahalek's request for prejudgment interest and costs.

I.

Four relatives of Muriel Kole, a passenger killed on KAL Flight 007, brought wrongful death actions against KAL under the Warsaw Convention. Kole's mother and sister brought an action in the Southern District of New York before Judge Motley ("Zicherman"). Kole's husband and brother ("Mahalek") brought separate actions in this Court.

Based on principles of collateral estoppel, this Court has repeatedly followed the ruling of Judge Motley in Zicherman, who ruled on several substantive issues prior to this Court

doing so. See In Re Korean Air Lines Disaster of September 1, 1983, 807 F.Supp. 1073 (S.D.N.Y. 1992).

Because Judge Motley had ruled that non-dependent relatives of a decedent could recover loss of society damages, this Court allowed Mahalek's case to proceed to trial. The jury awarded Mahalek $75,000 for the loss of society he suffered as a result of the death of his sister on KAL Flight 007. The Court entered a judgment on the Mahalek verdict on October 29, 1993.

II.

The Second Circuit has recently ruled on KAL's appeal of Judge Motley's ruling in Zicherman. In Zicherman v. Korean Airlines, Ltd., __ F.3d __, 1994 WL 685690 (2nd Cir. 1994), the Second Circuit affirmed Motley's opinion in part, reversed in part, and vacated in part. Most significantly, it held that general maritime law, not DOHSA applied to the KAL crash. 1994 WL 685690 at *3. In terms of loss of society damages, however, it held that "Zicherman [decedent's sister] and Mahalek [decedent's mother] may recover loss of society damages only if they were dependents of Kole at the time of her death." 1994 685690 at *4. The appeals court vacated the loss of society award to Mahalek (decedent's mother) because she conceded at trial she was not dependent on her daughter. As to Zicherman (decedent's sister}, the Court remanded to the trial court for a determination as to whether she was dependent on the decedent.

In the trial before this Court, Thomas Mahalek conceded that he was not dependent on his sister for financial support. Therefore, based on the Second Circuit's ruling in Zicherman, this Court grants KAL's motion for judgment as a matter of law.

In an attempt to avoid judgment as a matter of law, Mahalek cites Sutton v. Earles, 26 F.3d 903, 917 (9th Cir. 1994) for the proposition that, in the Ninth Circuit, a plaintiff

bringing a wrongful death action under general maritime law need not show that he is dependent on a decedent to recover loss of society damages. Id.

Sutton is distinguishable from the case at hand, however, because it held only that parent plaintiffs could collect loss of society damages without regard to dependency. Id. The Ninth Circuit based this ruling in part on the fact that parents are common beneficiaries of wrongful death statutes. Id. at 915. This rationale does not apply to non-dependent siblings, however. See, e.g., Evich v. Connelly, 759 F.2d 1432 (9th Cir. 1985), cert. denied, 484 U.S. 914 (1987) (non-dependent sibling may not bring wrongful death action under the Jones Act or DOHSA).

Mahalek also argues that KAL's motion for judgment as a matter of law should not be considered because KAL did not make its motion at the close of the evidence as required by Rule 50(a). However, KAL has provided transcripts that show it moved for a "directed verdict." See Reply of Korean Air Lines Co., Ltd. to Plaintiff's Supplemental Memorandum of Points and Authorities in Opposition to Motion for Judgment as a Matter of Law, filed October 20, 1994, Ex. A. Therefore, this argument is without merit.

Additionally, Mahalek argues that KAL did not file its motion for judgment as a matter of law not later than ten days after entry of judgment as required by Rule 50(b). Judgment was entered on October 29, 1993. KAL filed its motion on November 12, 1993. When the period of time prescribed by a rule is less than eleven days, intermediate Saturdays, Sundays, and holidays are excluded in the computation. Fed.R.Civ.P. 6(a) Under this computation, the motion was timely file.

III.

Accordingly,

IT IS HEREBY ORDERED THAT:

1. KAL's motion for judgment as a matter of law is GRANTED.

2. Mahalek's motion for prejudgment interest and costs in DENIED.

DATED: March 8, 1995

WILLIAM H. ORRICK
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE
WILLIAM H. ORRICK, SENIOR JUDGE

THOMAS L. MAHALEK, INDIVIDUALLY AND AS THE HEIR OF MURIEL KOLE PLAINTIFF, VS. KOREAN AIRLINES, CO., LTD., DEFENDANT.	)	NO. C-83- 4381WHO

SAN FRANCISCO, CALIFORNIA
MONDAY, OCTOBER 25, 1993
TUESDAY, OCTOBER 26, 1993

TRANSCRIPT OF PROCEEDINGS

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CM OFFICIAL REPORTER, USDC

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SAN FRANCISCO, CA. 94102

I'LL EVER KNOW AT THE MOMENT.

MR. BROWN: I GUESS THE THREE IN CONTENTION ARE THE FIRST THREE YOU READ. IF I'M CORRECT IN UNDERSTANDING YOUR HONOR, YOU SAID YOU WOULD USE THE PLAINTIFF'S INSTRUCTION ON WRONGFUL DEATH, THE DEFENDANT'S INSTRUCTION ON GRIEF AND SORROW AND THE DEFENDANT'S INSTRUCTION ON MENTAL ANGUISH?

THE COURT: YES.

MR. BROWN: I DO HAVE SOME OBJECTIONS TO THE USE OF THOSE TWO INSTRUCTIONS BY DEFENDANT.

THE COURT: GET THEM SPECIFICALLY IN WRITING AND I WILL DEAL WITH THEM.

MR. GINGER: YOUR HONOR, JUST TO PROTECT OUR POSITION AND PRESERVE THE RIGHTS

ON APPEAL, I HAVE TO STATE THE GROUNDS FOR MY MOTION FOR DIRECTED VERDICT, AND I WOULD APPRECIATE IT IF YOU WOULD GIVE A RULING. I THINK IT'S THE SAME RULING YOU HAVE BEEN GIVING ALL ALONG.

IN ANY EVENT, WE MOVE FOR DIRECTED VERDICT ON THE GROUNDS THAT PLAINTIFF HAS NO STANDING TO BRING THIS ACTION UNDER DOHSA; THAT LOSS OF SOCIETY IS NOT RECOVERABLE UNDER THE APPLICABLE LAW, WHICH WE SAY IS DOHSA; THAT MENTAL ANGUISH AND GRIEF IS NOT RECOVERABLE UNDER THE APPLICABLE LAW, WHICH IS DOHSA, OR ANY FEDERAL COMMON LAW.

THERE IS INSUFFICIENT EVIDENCE TO LET THE CASE GO TO THE JURY ON THE ISSUE OF LOSS OF SOCIETY BECAUSE HE'S TESTIFIED THAT HE WAS NOT FINANCIALLY DEPENDENT, AND WE SAY

THAT UNDER THE LAW YOU HAVE TO BE FINANCIALLY DEPENDENT TO GET ANYTHING.

ALSO THERE IS INSUFFICIENT EVIDENCE TO LET THE CASE GO TO THE JURY UNDER YOUR RULING THERE HAS TO BE A PHYSICAL MANIFESTATION. I DON'T BELIEVE ANY OF THE MATTERS THEY TESTIFIED TO CONSTITUTE A PHYSICAL MANIFESTATION OR ACTUAL MENTAL OR PHYSICAL INJURY.

THE COURT: THE MOTION FOR DIRECTED VERDICT IS DENIED. COURT IS IN RECESS.

(TRIAL ADJOURNED)

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

THOMAS L. MAHALEK, individually and as the heir of MURIEL KOLE Plaintiff, vs. KOREAN AIR LINES, CO., LTD., et al. Defendants.	NO. 83 4381 WHO NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that plaintiff THOMAS MAHALEK, in the above-referenced case appeals to the Court of Appeals, Ninth Circuit, from the Amended Judgment on Jury Verdict filed March 9, 1995, and the order granting defendant Korean Air Lines' Motion for Judgment as a Matter of Law, filed March 9, 1995.

NOTICE IS FURTHER GIVEN THAT plaintiff requests the Clerk of the above-entitled Court to prepare a Clerk's transcript and designate all papers and records on file or lodged with the Court in the above-entitled action.

DATED: March 21, 1995

BROWN, MONZIONE, FABBRO, ZAKARIA & SCARLETT

BY: _____
RICHARD E. BROWN
Attorney for Plaintiff
THOMAS MAHALEK

APPENDIX E

Office of the Clerk
United States Court of Appeals for the Ninth Circuit
121 Spear Street, P.O. Box 193939
San Francisco, CA 94105-3939

March 28, 1995

U.S. Court of Appeals Docket Number: 95-15559
Lower Court Docket No.: CV-83-04381-WHO
Short Title: Mahalek v. Korean Air Lines Co.

Dear Counsel:

A copy of your notice of appeal/petition has been received in the Clerk's office of the United States Court of Appeals for the Ninth Circuit.

The U.S. Court of Appeals docket number shown above has been assigned to this case. You must indicate this Court of Appeal docket number when corresponding with this office relative to your case. Please furnish this docket number immediately to the court reporter if you place an order, or have placed an order, for portions of the trial transcripts. The court reporter will need this docket number when communicating with this court.

THE DUE DATES FOR DESIGNATING AND FILING THE REPORTER'S TRANSCRIPT IF APPLICABLE, FILING THE PARTIES' BRIEFS AND OTHERWISE PERFECTING THE APPEAL HAVE BEEN SET BY THE ENCLOSED "TIME SCHEDULE ORDER", PURSUANT TO APPLICABLE FRAP RULES. THESE DATES CAN BE EXTENDED ONLY BY COURT ORDER. FAILURE OF

THE APPELLANT TO COMPLY WITH THE TIME SCHEDULE ORDER WILL RESULT IN AUTOMATIC DISMISSAL OF THE APPEAL.

The following information is being provided in an attempt to answer the most frequently asked questions regarding the appellate process. Please review this information very carefully. For convenience, the term "Circuit Rules" will be used for "Rules of the United States Court of Appeals for the Ninth Circuit" and "FRAP" for "Federal Rules of Appellate Procedure" will be used throughout this document.

Enclosed with this letter is an appellate processing schedule along with a case processing checklist which may be attached to your case file as an aid in monitoring case progress.

APPELLANTS/PETITIONERS WHO ARE FILING PRO SE SHOULD REFER TO THE ACCOMPANYING INFORMATION SHEET REGARDING THE FILING OF INFORMAL BRIEFS.

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
AUG 9 1995

THOMAS L. MAHALEK, individually and as the heir of MURIEL KOLE	)	NO. 95-15559
	)	
	)	REQUEST FOR
Appellant,	)	VOLUNTARY
	)	DISMISSAL
vs.	)	
	)	
KOREAN AIR LINES, CO., LTD.,	)	
	)	
Respondent.	)	
	)	

Appellant THOMAS L. MAHALEK hereby moves for a Voluntary Dismissal of the above-captioned appeal without prejudice to reinstate upon disposition of the United States Supreme Court Decision in Zicherman v. Korean Air Lines, 115 SC 1689, Docketed April 17, 1995.

Dated: August 8, 1995

BROWN, MONZIONE, FABBRO,
ZAKARIA & SCARLETT

BY:_____
RICHARD E. BROWN
Attorney for Plaintiff
THOMAS MAHALEK

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
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THOMAS L. MAHALEK, individually and as the heir of MURIEL KOLE	)	NO. 95-15559
Plaintiff/Appellant	)	DC# CV-83-4381-WHO Northern California (San Francisco)
vs.	)	
KOREAN AIR LINES, CO., LTD.,	)	
Defendants/Appellee.	)	ORDER

Appellant's motion for voluntary dismissal of this appeal without prejudice to reinstatement upon disposition of the United States Supreme Court decision in Zicherman v. Korean Air Lines, 115 S. Ct. 1689, docketed April 17, 1995 is granted. The motion to reinstate must be filed within 28 days after the Supreme Court disposition.

A certified copy of this order sent to the district court shall act as and for the mandate of this court.

For the Court:

CATHY A. CATTERSON
Clerk of the Court

Wayne Anderson
Deputy Clerk

pro 8.28

THOMAS MAHALEK v. KOREAN AIR LINES CO. Ltd.
U. S. District Court, Northern Div. of California, No. C 83 4381 WHO

CERTIFICATE OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SAN FRANCISCO

I hereby certify that a copy of the foregoing **Petitioner, Thomas Mahalek's Petition for Writ of Certiorari** was mailed on October 26, 1995, with postage thereon fully prepaid to be placed in the U.S. mail at San Francisco, California, to all parties required to be served in said action by placing a copy thereof, enclosed in a sealed envelope, addressed as follows:

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No. 95-717

(2)

Supreme Court, U.S.
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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

THOMAS MAHALEK,

Petitioner,

—v.—

KOREAN AIR LINES CO., LTD.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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50P?

COUNTER-STATEMENT OF QUESTION PRESENTED FOR REVIEW

Are nonpecuniary damages for loss of society recoverable by a nondependent sibling of a decedent, for a death occurring on the high seas, within the meaning of DOHSA[1], during the course of international air transportation, within the meaning of the Warsaw Convention[2]?

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[1] Death on the High Seas Act, 46 U.S.C. App. § 761 *et seq.*

[2] Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No 876 (1934), *reprinted in* note following 49 U.S.C. App. § 1502 ("Warsaw Convention").

LIST OF ALL PARTIES AND RULE 29.1 LISTING

A. Petitioner

The Petitioner is Thomas Mahalek, who was the plaintiff-appellant in the Court of Appeals.

B. Respondent

The Respondent is KOREAN AIR LINES CO., LTD. ("KAL") who was the defendant-appellee in the Court of Appeals. KAL is a Korean corporation engaged in the business of international transportation by air of passengers, baggage and cargo. KAL is a member of The Hanjin Group of Korea, which comprises companies under common management direction. KAL's investments in securities and/or affiliated companies consist of the following:

Air Cargo Terminal Co., Ltd.
Air Korea Co., Ltd.
Daehan Oil Pipeline Corporation
Government Bonds
Hana Bank
Hanil Bank
Hanjin Construction Co., Ltd.
Hanjin Data Communication
Hanjin Heavy Industry Co., Ltd.
Hanjin International Corp.
Hanjin Int'l Japan Co., Ltd.
Hanjin Investment Securities Co., Ltd.
Hanjin Shipping Co., Ltd.
Hyundai Oil Refinery Co., Ltd.
Korea Air Terminal Service Co., Ltd.
Korea Freight Transportation Co., Ltd.
Korea Investment Corporation
Korean French Banking Corporation
Korea Technology Development Co., Ltd.
Kyungki Bank, Ltd.

Peace Bank of Korea
Terminal One Management Inc.
The Company Fund
The Korea Economic Daily

TABLE OF CONTENTS

PAGE

COUNTER-STATEMENT OF QUESTION PRESENTED FOR REVIEW i

LIST OF ALL PARTIES AND RULE 29.1 LISTING.. ii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

JURISDICTION..... 2

STATUTORY AND TREATY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE..... 3

A. Nature of the Case and Governing Law 3

B. Disposition Below 4

1. The Damage Trial in the District Court 4

2. The Appeal to the Court of Appeals.... 5

REASONS FOR DENYING THIS WRIT..... 7

I. THE COURT LACKS JURISDICTION TO CONSIDER THE PETITION AS IT IS PREMATURE..... 7

PAGE

II. CERTIORARI BEFORE JUDGMENT ALSO SHOULD BE DENIED BECAUSE THE QUESTION PRESENTED IS NOT OF SUCH IMPERATIVE PUBLIC IMPORTANCE AS TO JUSTIFY DEVIATION FROM NORMAL APPELLATE PRACTICE 8

A. The Pendency of *Zicherman* Does Not Warrant Certiorari in this Case 8

B. The District Court's Decision that Nonpecuniary Damages for Loss Of Society Are Recoverable Only by Financially Dependent Siblings Is Not in Conflict with the Decision of Any United States Court of Appeals 9

III. THE PETITION FAILS TO RAISE A QUESTION THAT JUSTIFIES REVIEW BECAUSE PETITIONER LACKS STANDING TO MAINTAIN THIS ACTION 11

CONCLUSION 14

APPENDIX 1a

TABLE OF AUTHORITIES

Cases: PAGE

Alcabasa v. Korean Air Lines, 62 F.3d 404 (D.C. Cir. 1995) 3, 4, 11, 12

Anderson v. Whittaker Corp., 894 F.2d 804 (6th Cir. 1990) 10

Benjamins v. British European Airways, 572 F.2d 913 (2d Cir. 1978), *cert. denied*, 439 U.S. 1114 (1979) 3n

Bergen v. F/V St. Patrick, 816 F.2d 1345 (9th Cir. 1987), *modified on other grounds*, 866 F.2d 318 (9th Cir.), *cert. denied*, 493 U.S. 871 (1989) 10

Calton v. Zapata Lexington, 811 F.2d 919 (5th Cir. 1987) 12n

Coleman v. Paccar, Inc., 424 U.S. 1301 (1976) 7

Cruz v. Korean Air Lines, 838 F. Supp. 843 (S.D.N.Y. 1993) 12

D'Aleman v. Pan American World Airways, 259 F.2d 493 (2d Cir. 1958) 12

Evich v. Connelly, 759 F.2d 1432 (9th Cir. 1985) 10

Favaloro v. S/S Golden Gate, 687 F. Supp. 475 (N.D. Cal. 1987) 12

Forsyth v. City of Hammond, 166 U.S. 506 (1897) 7

Futch v. Midland Enter., Inc., 471 F.2d 1195 (5th Cir. 1973) 12

Gay v. Ruff, 292 U.S. 25 (1934) 7

PAGE

Harris v. Polskie Linie Lotnicze, 820 F.2d 1000 (9th Cir. 1987) 3

In re ABC Charters, Inc., 558 F. Supp 364 (W.D. Wash. 1983) 10

In re Air Disaster at Lockerbie, Scotland, on Dec. 21, 1988, 928 F.2d 1267 (2d Cir.), *cert. denied*, 502 U.S. 920 (1991) ("*Lockerbie I*") 3

In re Korean Air Lines Disaster of Sept. 1, 1983, 932 F.2d 1475 (D.C. Cir.), *cert. denied*, 502 U.S. 994 (1991) ("*Korean Air I*") 3, 4n, 11

In re Korean Air Lines Disaster of Sept. 1, 1983, 807 F. Supp. 1073 (S.D.N.Y. 1992) 12n

In re Mexico City Aircrash of Oct. 31, 1979, 708 F.2d 400 (9th Cir. 1983) 3n, 11

Mahalek v. Korean Air Lines, No. 95-15559 (9th Cir. appeal filed Mar. 24, 1995) 5

Miles v. Apex Marine Corp., 498 U.S. 19 (1990) 4, 9n

Miles v. Melrose, 882 F.2d 976 (5th Cir. 1989), *aff'd sub nom. on other grounds, Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990) 10

Mobil Oil Corp. v. Higginbotham, 436 U.S. 618 (1978) 4, 9n

Nejad v. United States, 724 F. Supp. 753 (C.D. Cal. 1989) 12

Nixon v. Fitzgerald, 457 U.S. 731 (1982) 7

Porter v. Dicken, 328 U.S. 252 (1946) 9

Southern Pacific Co. v. Heavingham, 236 F.2d 406 (9th Cir. 1956) 12n

PAGE

Sutton v. Earles, 26 F.3d 903 (9th Cir. 1994) 8, 10

Taylor v. McElroy, 358 U.S. 918 (1958) 9

Tidewater Marine Towing, Inc. v. Dow Chemical Co., 689 F.2d 1251 (5th Cir. 1982) 12

Turgen v. City of Corvallis, 26 F.3d 978 (9th Cir.), *cert. denied*, 115 S. Ct. 426 (1994) 5, 13

United States v. Nixon, 418 U.S. 683 (1974) 7

United States v. Raines, 362 U.S. 17 (1960) 6, 13

Wahlstrom v. Kawasaki Heavy Indus., 4 F.3d 1084 (2d Cir. 1993), *cert. denied*, 114 S. Ct. 1060 (1994) 10

Williams v. Louisville & Nashville R.R. Co., 371 F.2d 125 (6th Cir.), *cert. denied*, 388 U.S. 919 (1967) 12

Zicherman v. Korean Air Lines, 43 F.3d 18 (2d Cir. 1994), *cert. granted*, 115 S. Ct. 1689 (1995) (Nos. 94-1361, 94-1477) ..... *passim*

Treaties, Statutes and Rules:

Convention for the Unification of Certain Rules Relating to International Transportation by Air, October 12, 1929, 49 Stat. 3000, T.S. No. 876, *reprinted in* note following 49 U.S.C. App. § 1502 ..... *passim*

Death on the High Seas Act (DOHSA), 46 U.S.C. App. § 761 *et seq.* ..... *passim*

Jones Act, 46 U.S.C. App. § 688 ..... 12n

Federal Employers' Liability Act, 45 U.S.C. § 59 ..... 12n

28 U.S.C. § 1254(1) 2, 7, 8

PAGE

28 U.S.C. § 2101(e) 2

Fed. R. Civ. P. 50(b) 5

Sup. Ct. R. 11 8

Other Authorities:

Agreement Relating to Liability Limitations of the Warsaw Convention and the Hague Protocol, CAB Agreement 18900, *reprinted in* note following 49 U.S.C. App. § 1502 (approved by CAB Order E-23680, May 13, 1966, 31 Fed. Reg. 7302) 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-717

THOMAS MAHALEK,

Petitioner,

—v.—

KOREAN AIR LINES CO., LTD.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

OPINIONS BELOW

No opinion of the Court of Appeals has been issued, as the Petitioner filed the Petition for Writ of Certiorari prior to the submission of any briefs to the Court of Appeals. The opinion of the district court is not officially reported and is reproduced in the Appendix to the Petition for Writ of Certiorari at A2-5.[1] The other relevant opinions and orders of the district court and Court of Appeals are reproduced at RA1a-2a, 5a-6a, 7a-8a, 11a-12a, 13a-14a, 17a-18a.[2]

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[1] References preceded by "A" refer to pages in the Appendix to the Petition.

[2] References preceded by "RA" refer to pages in the Appendix hereto.

JURISDICTION

The amended final judgment on the jury verdict was entered on March 9, 1995. RA11a-12a. Petitioner filed a Notice of Appeal to the United States Court of Appeals for the Ninth Circuit on March 24, 1995. RA9a-10a. On August 9, 1995, at the invitation of the Court of Appeals, Petitioner filed a motion to voluntarily dismiss the appeal, without prejudice to reinstatement upon the Court's disposition of *Zicherman v. Korean Air Lines*, 115 S. Ct. 1689 (1995) (Nos. 94-1361, 94-1477). RA3a-4a. The Court of Appeals granted Petitioner's motion and dismissed the appeal. RA1a-2a. The Order of Dismissal and Mandate to the district court were filed on September 5, 1995. RA1a-2a. The Petition for Writ of Certiorari was docketed on November 3, 1995. Petitioner invokes the jurisdiction of the Court under 28 U.S.C. §§ 1254(1), 2101(e).

STATUTORY AND TREATY PROVISIONS INVOLVED

The applicable statutes are the Death on the High Seas Act, 46 U.S.C. App. § 761 *et seq.* ("DOHSA") and 28 U.S.C. § 1254(1). The applicable treaty is the Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No 876 (1934), *reprinted in* note following 49 U.S.C. App. § 1502 ("Warsaw Convention"). The pertinent provisions are set forth in the text herein or in the Appendix hereto at RA22a-23a.

STATEMENT OF THE CASE

A. Nature of the Case and Governing Law

Petitioner, Thomas Mahalek, is the adult brother of MURIEL KOLE (hereinafter the "decedent"), a passenger killed on KAL flight KE007, which was shot down by Soviet military aircraft on September 1, 1983. Petitioner commenced this wrongful death action against KAL individually and in his personal capacity to recover wrongful death damages for the death of his sister. *Mahalek v. Korean Air Lines*, No. 83-4381 (N.D. Cal.). Petitioner is not the personal representative of the estate of his sister.

The action is governed by DOHSA and the Warsaw Convention, as supplemented by the Montreal Agreement.[3] Although the Warsaw Convention has been held to create a wrongful death action for passengers killed during "international transportation by air,"[4] the Convention does not set forth who may maintain an action, the types of recoverable compensatory damages or the proper claimants in the event of the death of a passenger. These issues were left intentionally by the drafters of the Convention for determination by the internal damage laws of each contracting party to the Convention. *See Alcabasa v. Korean Air Lines*, 62 F.3d 404 (D.C. Cir. 1995); *In re Korean Air Lines Disaster of Sept. 1, 1983*, 932 F.2d 1475, 1488 (D.C. Cir.), *cert. denied*, 502 U.S. 994 (1991) ("*Korean Air I*"); *In re Air Disaster at Lockerbie, Scotland, on Dec. 21, 1988*, 928 F.2d 1267, 1283 (2d Cir.), *cert. denied*, 502 U.S. 920 (1991) ("*Lockerbie I*"); *Harris v. Polskie Linie Lotnicze*, 820 F.2d 1000, 1002 (9th Cir. 1987).

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[3] Agreement Relating to Liability Limitations of the Warsaw Convention and the Hague Protocol, CAB Agreement 18900, *reprinted in* note following 49 U.S.C. App. § 1502 (approved by CAB Order E-23680, May 13, 1966, 31 Fed. Reg. 7302).

[4] *In re Mexico City Aircrash of Oct. 31, 1979*, 708 F.2d 400 (9th Cir. 1983); *Benjamins v. British European Airways*, 572 F.2d 913 (2d Cir. 1978), *cert. denied*, 439 U.S. 1114 (1979).

DOHSA is the internal law of the United States which is applicable to all deaths occurring on the high seas and sets forth the proper person with standing to maintain an action, the types of recoverable compensatory damages and the proper persons for whose benefit the action must be brought. 46 U.S.C. App. §§ 761, 762 (RA23a); *see Alcabasa*, 62 F.3d at 406-08. It is undisputed that the death of decedent occurred on the high seas within the statutory scope and meaning of DOHSA. 46 U.S.C. App. §§ 761, 762 (RA23a). DOHSA specifically allows only the personal representative of a decedent to maintain a death action, restricts recoverable damages to pecuniary losses only and does not permit the recovery of nonpecuniary damages for loss of society. *See* 46 U.S.C. App. §§ 761, 762 (RA23a); *Miles v. Apex Marine Corp.*, 498 U.S. 19, 30-33 (1990); *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 622-25 (1978).

B. Disposition Below

1. The Damage Trial in the District Court

Prior to trial in the district court on the issue of recoverable compensatory damages,[5] KAL moved to dismiss the action commenced by Petitioner on the ground that, pursuant to § 761 of DOHSA, Petitioner lacked the capacity to maintain the action because he was not the "personal representative" of the estate of the decedent.[6] KAL also moved, *inter alia*, for a determination that DOHSA, as the federal law directly appli-

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[5] The liability of KAL was determined in the context of the multidistrict litigation proceedings before Judge Aubrey Robinson, Jr. in the United States Court of Appeals for the District of Columbia. *See Korean Air I*, 932 F.2d at 1476-79.

[6] The duly appointed personal representative had brought a wrongful death action against KAL in the United States District Court for the Southern District of New York which is currently pending before the Court. *Zicherman v. Korean Air Lines*, 115 S. Ct. 1689 (1995) (Nos. 94-1361, 94-1477), *granting cert. to*, 43 F.3d 18 (2d Cir. 1994) (oral argument heard Nov. 7, 1995).

cable to all deaths occurring on the high seas, prescribes the recoverable damages in this case, and prohibits the recovery of nonpecuniary damages for loss of society and survivor's grief. The district court denied KAL's motions and held that Petitioner was entitled to maintain the action in his individual capacity and, further, was entitled to recover nonpecuniary damages for loss of society and survivor's grief. RA17a-18a, 19a-21a.

A jury trial on the issues of compensatory damages was held in October, 1993. The jury awarded Petitioner $75,000 for loss of society damages and made no award for survivor's grief. RA13a-14a. Following the jury trial, KAL moved, pursuant to Fed. R. Civ. P. 50(b), for judgment as a matter of law on the grounds that DOHSA does not allow recovery of nonpecuniary damages for a death on the high seas and, alternatively, that Petitioner was not financially dependent on the decedent at the time of her death and, therefore, was precluded from recovering loss of society damages. Because Petitioner admitted at trial that he was not financially dependent upon the decedent (RA16a), the district court, relying on the Second Circuit's decision in *Zicherman v. Korean Air Lines*, 43 F.3d 18 (2d Cir. 1994), *cert. granted*, 115 S. Ct. 1689 (1995), granted KAL's motion for judgment as a matter of law and set aside the damage award for loss of society. A2-5.[7]

2. The Appeal to the Court of Appeals

Petitioner appealed the judgment of the district court. *Mahalek v. Korean Air Lines*, No. 95-15559 (9th Cir. appeal filed Mar. 24, 1995). Because KAL was the prevailing party in the district court and the sole damage award was set aside, KAL did not cross-appeal the district court's pre-trial ruling that Petitioner had standing to maintain an action separate from that of the personal representative. *See Turgen v. City of Corvallis*, 6 F.3d 978, 980 (9th Cir.), *cert. denied*, 115 S. Ct.

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[7] In *Zicherman*, 43 F.3d at 21-22, the Second Circuit held that loss of society damages are recoverable but only by dependent relatives.

426 (1994); *see also United States v. Raines*, 362 U.S. 17, 27 n.7 (1960).

Petitioner's opening brief in the Court of Appeals was due on July 14, 1995. RA7a-8a. Petitioner did not meet the filing date and requested a 14-day extension to July 27, 1995. The Court of Appeals granted the requested extension. On July 27, 1995, Petitioner filed a motion for a second extension of time and advised the Court of Appeals that he had filed a Petition for Writ of Certiorari with the Court on July 25, 1995. The Court of Appeals denied Petitioner's motion for a second extension of time. RA5a-6a. The Court of Appeals, however, ordered that:

> within 14 days from the date of this order, appellant [Petitioner] shall move for voluntary dismissal of his appeal without prejudice to reinstatement upon disposition of the U.S. Supreme Court case [*Zicherman*]. Alternatively, appellant [Petitioner] shall show cause, in writing, how he may be prejudiced by such a dismissal.

RA5a-6a.

Petitioner opted to request a voluntary dismissal of the appeal. RA3a-4a. The request for voluntary dismissal was filed on August 9, 1995 and subsequently was granted by the Court of Appeals by Order filed September 5, 1995. RA1a-2a.

Petitioner's initial Petition for Writ of Certiorari filed on July 25, 1995 was rejected by the Clerk of the Court. Petitioner thereafter filed this second Petition which was docketed on November 3, 1995.

REASONS FOR DENYING THIS WRIT

I

THE COURT LACKS JURISDICTION TO CONSIDER THE PETITION AS IT IS PREMATURE

Petitioner seeks a writ of certiorari before judgment in the Court of Appeals for the Ninth Circuit. Pursuant to 28 U.S.C § 1254(1), a petition for a writ of certiorari may be filed with the Court before judgment by a Court of Appeals.[8] The primary requisite to the exercise of the Court's power to grant certiorari before rendition of judgment by the Court of Appeals is that the case is "pending in" the Court of Appeals. *See Nixon v. Fitzgerald*, 457 U.S. 731, 741-43 (1982); *Coleman v. Paccar, Inc.*, 424 U.S. 1301, 1303 (1976); *United States v. Nixon*, 418 U.S. 683, 690-92 (1974). The Court has explained "that the sole essential of [the] Court's jurisdiction to review is that there be a case pending in the circuit court of appeals." *Gay v. Ruff*, 292 U.S. 25, 30 (1934) (citing *Forsyth v. City of Hammond*, 166 U.S. 506, 512 (1897)).

The Court lacks jurisdiction over the Petition because there is no case "pending in" the Court of Appeals. Petitioner moved to voluntarily dismiss the appeal on August 9, 1995 at the invitation of the Court of Appeals. RA3a-4a. The Court of Appeals granted Petitioner's motion to dismiss the appeal and issued an order and mandate to the district court on September 5, 1995. RA1a-2a. The Petition for Writ of Certiorari was not docketed until November 3, 1995. Since there is no case

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[8] Section 1254(1) provides:

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

28 U.S.C. § 1254(1).

"pending in" the Court of Appeals, jurisdiction does not exist under 28 U.S.C. § 1254(1). For this reason, the Petition should be denied.

II

CERTIORARI BEFORE JUDGMENT ALSO SHOULD BE DENIED BECAUSE THE QUESTION PRESENTED IS NOT OF SUCH IMPERATIVE PUBLIC IMPORTANCE AS TO JUSTIFY DEVIATION FROM NORMAL APPELLATE PRACTICE

Even if the case can be considered to be pending in the Court of Appeals within the meaning of 28 U.S.C. § 1254(1), a Petition before judgment "will be granted only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court." Sup. Ct. R. 11.

Petitioner argues that review is justified at this time because (1) the *Zicherman* case which is pending before the Court involves the same issue presented by the Petition herein, and (2) the decision of the district court to set aside the damage award to Petitioner, the nondependent sibling of the decedent, is in conflict with *Sutton v. Earles*, 26 F.3d 903 (9th Cir. 1994). Neither argument supports the position that this case is "of such imperative public importance" so as to justify departure from the usual appellate review process.

A. The Pendency of *Zicherman* Does Not Warrant Certiorari in this Case

Petitioner argues that the Court should grant the Petition because the Court granted certiorari in *Zicherman*. The mere fact that a case is pending in the Court involving a similar issue, without more, does not justify departure from the usual appellate review process.

In support of his argument, Petitioner relies on *Taylor v. McElroy*, 358 U.S. 918 (1958) and *Porter v. Dicken*, 328 U.S. 252 (1946), where the Court granted certiorari on the basis that the Court had granted certiorari in a companion case. Those cases are inapposite to the Petitioner's case. While in *Taylor* and *Porter* the question raised by the petitions involved the same issue as cases already before the Court, unlike *Taylor* and *Porter* there is a threshold issue in this case of Petitioner's standing to maintain this wrongful death action in his individual capacity, apart from the action by the personal representative. Resolution of this issue in favor of KAL by the Court of Appeals, if the appeal is reinstated by Petitioner following the decision in *Zicherman*, will render this Petition moot. *See infra.* at 11. Moreover, the Court granted certiorari in *Taylor* and *Porter* before oral argument of the cases already pending before the Court. Here, however, *Zicherman* has been heard by the Court and the concerns that the Court was faced with in *Taylor* and *Porter* do not exist in this case. Moreover, if *Zicherman* results in a decision denying recovery of loss of society damages in these cases, there would be no basis to reinstate the appeal in the Court of Appeals.

B. The District Court's Decision that Nonpecuniary Damages for Loss Of Society Are Recoverable Only by Financially Dependent Siblings Is Not in Conflict with the Decision of Any United States Court of Appeals

Petitioner is correct that the issue whether nondependent relatives may recover loss of society damages currently is pending before the Court in *Zicherman*. Petitioner is incorrect, however, when he argues that the decision of the district court conflicts with *any* Court of Appeals decision.[9] The dis-

[9] The only portion of the district court decision that *is* contrary to federal and general maritime law, is the district court's initial holding that Petitioner had standing to maintain this action and that loss of society damages are recoverable at all for a death on the high seas. *Miles*, 498 U.S. at 30-33; *Higginbotham*, 436 U.S. at 622-25; *see infra.* at 11-13. The latter issue currently is pending before the Court in *Zicherman*.

trict court's decision that damages for loss of society are not recoverable by a nondependent *sibling* is consistent with well settled authority that the threshold requirement for the recovery by a sibling of *any* pecuniary damages under DOHSA,[10] *or* pecuniary/nonpecuniary damages under general maritime law, is that the sibling be financially dependent upon the decedent at the time of death. *See Wahlstrom v. Kawasaki Heavy Indus., Ltd.*, 4 F.3d 1084, 1090 (2d Cir. 1993), *cert. denied*, 114 S. Ct. 1060 (1994); *Anderson v. Whittaker Corp.*, 894 F.2d 804, 811-12 (6th Cir. 1990); *Miles v. Melrose*, 882 F.2d 976, 988-89 (5th Cir. 1989), *aff'd sub nom. on other grounds, Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990); *Bergen v. F/V St. Patrick*, 816 F.2d 1345, 1350 (9th Cir. 1987), *modified on other grounds*, 866 F.2d 318 (9th Cir.), *cert. denied*, 493 U.S. 871 (1989); *Evich v. Connelly*, 759 F.2d 1432, 1433 (9th Cir. 1985); *see also In re ABC Charters, Inc.*, 558 F. Supp 364, 366 (W.D. Wash. 1983).

The only decision Petitioner relies upon to establish the purported conflict is *Sutton v. Earles*, 26 F.3d 903 (9th Cir. 1994), which involved wrongful death actions by nondependent *parents* of decedents killed in the territorial waters of the United States. The court in *Sutton* held that dependency is not relevant to the recovery of loss of society damages by a *parent* under general maritime law and allowed nondependent parents of the decedents to recover loss of society damages. 26 F.3d at 916-17. The decision did not address and left undisturbed the rule that siblings must establish dependency in order to recover.

The decision of the district court is consistent with DOHSA and general maritime law, which require a showing of financial dependency for a sibling to recover *any* damages, pecuniary or nonpecuniary. Thus, there is no need for the Court to review this aspect of the decision of the district court.

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[10] The schedule of beneficiaries in DOHSA limits the beneficiaries to the "decedent's wife, husband, parent, child or *dependent relative*." 46 U.S.C. App. § 761 (emphasis added) (RA23a).

III

THE PETITION FAILS TO RAISE A QUESTION THAT JUSTIFIES REVIEW BECAUSE PETITIONER LACKS STANDING TO MAINTAIN THIS ACTION

Even if the Court in *Zicherman* concludes that loss of society damages are recoverable, and allows a financially non-dependent sibling to recover such damages, the district court's decision to set aside the damage award for loss of society is correct, albeit on other grounds not presently before the Court of Appeals.

Petitioner brought a separate wrongful death action in his individual capacity, apart from the action that was instituted by the personal representative of decedent's estate in New York. The district court, in denying KAL's motion to dismiss the action for lack of standing, held that Petitioner could maintain the action in his individual capacity because the Convention contains no limitation as to standing. RA17a-18a, 19a-21a. This decision of the district court is incorrect and contrary to the well established rule under DOHSA and general maritime law that only the personal representative of the estate has standing to maintain a wrongful death action. Thus, the issue of standing is a threshold issue that must be addressed and resolved by the Court of Appeals, in the event the appeal is reinstated following the decision in *Zicherman*, before the question of recoverable damages is reached.

It is undisputed that this action is governed by the Warsaw Convention. The Convention does not address who may maintain the cause of action for wrongful death. Pursuant to Article 24(2) of the Convention, the question of standing to maintain an action under the Convention was intentionally left to be governed by the internal law of the parties to the Convention. *Alcabasa*, 62 F.3d at 406-08; *Korean Air I*, 932 F.2d at 1485; *Mexico City*, 708 F.2d at 415. As the death of

the decedent occurred on the high seas, the directly applicable federal statute is DOHSA. *Alcabasa*, 62 F.3d at 406-08.

Under § 761 of DOHSA, the only proper party plaintiff that has standing to maintain a death action involving a death on the high seas is "the *personal representative* of the decedent." 46 U.S.C. § 761 (emphasis added) (RA23a); *see* 46 U.S.C. App. § 762 (RA23a); *Alcabasa*, 62 F.3d at 406-08; *D'Aleman v. Pan American World Airways*, 259 F.2d 493, 494-95 (2d Cir. 1958); *Cruz v. Korean Air Lines*, 838 F. Supp. 843, 846-847 (S.D.N.Y. 1993); *Favaloro v. S/S Golden Gate*, 687 F. Supp. 475, 478-79 (N.D. Cal. 1987).[11] Where the law providing the basis for a cause of action for wrongful death requires that the lawsuit be filed by the personal representative, a separate action brought by a potential beneficiary must be dismissed. *Alcabasa*, 62 F.3d at 408; *Tidewater Marine Towing, Inc. v. Dow Chemical Co.*, 689 F.2d 1251, 1253 (5th Cir. 1982); *Futch*, 471 F.2d at 1196; *Williams v. Louisville & Nashville R.R. Co.*, 371 F.2d 125, 127-28 (6th Cir.), *cert. denied*, 388 U.S. 919 (1967); *Nejad v. United States*, 724 F. Supp. 753, 756 (C.D. Cal. 1989); *Favaloro*, 687 F. Supp. at 478-79; *see also Cruz*, 838 F. Supp. at 846-48.[12]

In this case, the only proper action for the death of the decedent was by the personal representative of decedent, Marjorie Zicherman, the plaintiff in the New York action. Marjorie Zicherman, Petitioner's sister, had the sole and absolute

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[11] Similarly, the Jones Act, 46 U.S.C. App. § 688, Federal Employers' Liability Act, 45 U.S.C. App. § 59, and general maritime law, allow only the duly appointed personal representative of the decedent's estate to maintain an action for the benefit of the estate and any beneficiaries. *Calton v. Zapata Lexington*, 811 F.2d 919, 921 (5th Cir. 1987); *Futch v. Midland Enter., Inc.*, 471 F.2d 1195, 1196 (5th Cir. 1973); *Southern Pacific Co. v. Heavingham*, 236 F.2d 406, 408 (9th Cir. 1956).

[12] *But see In re Korean Air Lines Disaster of Sept. 1, 1983*, 807 F. Supp. 1073 (S.D.N.Y. 1992) (holding that Warsaw Convention allows individuals other than personal representative to file suit). The rationale of this decision was expressly rejected in *Alcabasa*, 62 F.3d at 406 and *Cruz*, 838 F. Supp. at 846 n.2.

authority to litigate the wrongful death and survival action on behalf of the estate and all proper beneficiaries. Petitioner simply does not have standing to maintain a separate action in his individual capacity.

While the district court properly set aside the sole damage award in this case, the district court should have dismissed the entire action for lack of standing. Petitioner appealed the district court's decision to set aside the sole damage award by the jury. KAL, however, lacked standing to file a cross-appeal because KAL had successfully obtained a dismissal of the entire claim. *Turgen*, 26 F.3d at 980; *see Raines*, 362 U.S. at 27 n.7 (no cross-appeal necessary if the party received the relief it requested). On any reinstated appeal to the Court of Appeals, KAL will argue that the dismissal was proper on the alternative ground that Petitioner lacked standing.

No reason is presented for circumvention of the normal appellate procedure and the granting of certiorari at this time. Even if the Court in *Zicherman* concludes loss of society damages are recoverable, Petitioner still would not be entitled to any damages because Petitioner lacks standing to maintain this action.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Dated: December 1, 1995

Respectfully submitted,

TOMPKINS, HARAKAS, ELSASSER & TOMPKINS

Andrew J. Harakas*
George N. Tompkins, III

Courthouse Square
140 Grand Street
White Plains, New York 10601
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Attorneys for Respondent
KOREAN AIR LINES CO., LTD.

* Counsel of Record

Of Counsel:

Rosemary Wummel Gardey

APPENDIX

INDEX TO APPENDIX

		PAGE
1.	Order filed September 5, 1995 granting plaintiff's motion to dismiss the appeal	1a
2.	Plaintiff's Request for Voluntary Dismissal of Appeal dated August 8, 1995.....	3a
3.	Order filed July 28, 1995 (9th Cir.), denying plaintiff's motion for second extension of time to file brief and directing plaintiff to voluntarily dismiss appeal without prejudice or show cause how dismissal will cause prejudice.....	5a
4.	Time Schedule Order Issued by United States Court of Appeals for the Ninth Circuit	7a
5.	Notice of Appeal filed March 24, 1995 by plaintiff.....	9a
6.	Amended Judgment on Jury Verdict entered March 10, 1995.....	11a
7.	Judgment of Jury Verdict entered October 29, 1993	13a
8.	Trial Transcript, October 25-26, 1995, p. 97 (N.D. Cal.) (WHO).....	15a
9.	Order entered August 13, 1993, denying KAL's motion for summary judgment.....	17a
10.	Pre-Trial Transcript, August 5, 1993, pp. 2-4 (N.D. Cal.) (WHO).....	19a

PAGE

11. Relevant Provisions of the Warsaw Convention
    Article 17 ..... 22a
    Article 24 ..... 22a

12. Relevant Provisions of the Death on the High Seas Act, 46 U.S.C. App. § 761 *et seq.*
    46 U.S.C. App. § 761 ..... 23a
    46 U.S.C. App. § 762 ..... 23a

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 95-15559
DC# CV-83-4381-WHO
Northern California
(San Francisco)

Filed September 5, 1995

THOMAS L. MAHALEK, individually and as the heir of Muriel Kole,

Plaintiff/Appellant,

—VS.—

KOREAN AIR LINES CO., LTD.,

Defendant/Appellee.

ORDER

Appellant's motion for voluntary dismissal of this appeal without prejudice to reinstatement upon disposition of the United States Supreme Court decision in *Zicherman v. Korean Air Lines*, 115 S. Ct. 1689, docketed April 17, 1995 is granted. The motion to reinstate must be filed within 28 days after the Supreme Court disposition.

A certified copy of this order sent to the district court shall act as and for the mandate of this court.

For the Court:

CATHY A. CATTERSON
Clerk of the Court

/s/ WAYNE ANDERSON
Wayne Anderson
Deputy Clerk

BROWN, MONZIONE, FABBRO, ZAKARIA & SCARLETT
RICHARD E. BROWN, ESQUIRE (State Bar #104253)
900 Montgomery Street
San Francisco, CA 94133
Telephone: (415) 834-1111

Attorneys for Plaintiff
THOMAS L. MAHALEK

UNITED STATES DISTRICT COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 95-15559
Filed August 9, 1995

THOMAS L. MAHALEK, individually and as the heir of MURIEL KOLE,

Appellant,

—VS.—

KOREAN AIR LINES, CO., LTD., et al.

Respondent.

REQUEST FOR VOLUNTARY DISMISSAL

Appellant THOMAS L. MAHALEK hereby moves for a Voluntary Dismissal of the above-captioned appeal without prejudice to reinstate upon disposition of the United States Supreme Court Decision in *Zicherman v. Korean Air Lines*, 115 SC 1689, Docketed April 17, 1995.

Dated: August 8, 1995

BROWN, MONZIONE, FABBRO,
ZAKARIA & SCARLETT

By: RICHARD E. BROWN
RICHARD E. BROWN, ESQ.
Attorney for Appellant

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 95-15559
DC# CV-83-4381-WHO
Northern California
(San Francisco)

Filed July 28, 1995

THOMAS L. MAHALEK, individually and as the heir of Muriel Kole,

Plaintiff/Appellant,

—VS.—

KOREAN AIR LINES CO., LTD.,

Defendant/Appellee.

ORDER

Movant is informed that an extension of time obtained by telephone is intended to be the sole extension of time to file that brief. Ninth Cir. R. 31-2.2(a).

The court is in receipt of appellant's late filed motion for an additional extension of time to file the opening brief. Appellant's motion is denied. However, within 14 days from the date of this order, appellant shall move for voluntary dis-

missal of his appeal without prejudice to reinstatement upon disposition of the U.S. Supreme Court case. Alternatively, appellant shall show cause, in writing, how he may be prejudiced by such a dismissal.

Failure to comply with this order in a timely fashion will subject this appeal to automatic dismissal pursuant to 9th Cir. R. 42-1.

Briefing shall be addressed, if appropriate, upon receipt of appellant's response.

For the Court:

CATHY A. CATTERSON
Clerk of the Court

MARIO GISCOME
Mario Giscome
Deputy Clerk
Ninth Cir. R. 27-7/Appendix A,
General Orders for the
United States Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 95-15559
DC# CV-83-04381-WHO

THOMAS L. MAHALEK, individually and as the heir of Muriel Kole,

Plaintiff-Appellant,

—v.—

KOREAN AIR LINES CO., LTD., a foreign corporation,

Defendant-Appellee.

TIME SCHEDULE ORDER

The parties shall meet the following time schedule:

-> Appellant/petitioner shall immediately file the civil appeals docketing statement (CADS), pursuant to Circuit Rule 33-1;

-> Appellant/petitioner shall notify appellee/respondent of transcripts to be ordered, pursuant to Circuit Rule 10-3.1(a); 4/6/95

-> Appellee/respondent shall notify appellant/petitioner of any additional transcripts needed, pursuant to Circuit Rule 10-3.1(b); 4/17/95

-> Appellant/petitioner shall file transcript order form with the district court and make payment arrangements with court reporter, pursuant to Circuit Rule 10-3.1; 4/26/95

-> Court reporter shall file transcript in the district court, pursuant to FRAP 11(b) and Circuit Rule 11-1.1; 5/30/95

-> Appellant/petitioner's opening brief, of no more than 35 pages, and excerpts of record shall be served and filed, pursuant to FRAP 31(a) and Circuit Rules 28-3.1 and 31-2; 7/13/95

-> The brief of appellee/respondent, of no more than 35 pages, shall be filed and served, pursuant to FRAP 31(a) and Circuit Rules 28-3.1 and 31-2; 8/14/95

-> The optional appellant/petitioner reply brief, of no more than 15 pages, shall be filed and served within fourteen days of service of the appellee/respondent's brief, pursuant to FRAP 31(a) and Circuit Rules 28-3.1 and 31-2.

FAILURE OF THE APPELLANT TO COMPLY WITH THE TIME SCHEDULE ORDER WILL RESULT IN AUTOMATIC DISMISSAL OF THE APPEAL. CIRCUIT RULE 42-1.

APPELLANTS/PETITIONERS WITHOUT REPRESENTATION OF COUNSEL IN A PRISONER APPEAL MAY HAVE THEIR CASE SUBMITTED ON THE BRIEFS AND RECORD WITHOUT ORAL ARGUMENT, PURSUANT TO FRAP 34(a)(3), CIRCUIT RULE 34-4. WITHIN 10 DAYS OF THE FILING OF THE APPELLANT'S OPENING BRIEF, PARTIES MAY FILE A STATEMENT SETTING FORTH THE REASONS WHY, IN THE OPINION OF THE PARTIES, ORAL ARGUMENT SHOULD BE HEARD.

FOR THE COURT:

Cathy A. Catterson
Clerk of Court

/s/ ED MANUEL
By: Ed Manuel
Deputy Clerk

BROWN, MONZIONE, FABBRO, ZAKARIA & SCARLETT
RICHARD E. BROWN, ESQUIRE (State Bar #104253)
900 Montgomery Street
San Francisco, CA 94133
Telephone: (415) 834-1111

Attorneys for Plaintiff
THOMAS L. MAHALEK

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C 83 4381 WHO
Filed March 24, 1995

THOMAS L. MAHALEK, individually and as the heir of MURIEL KOLE,

Plaintiff,

—vs.—

KOREAN AIR LINES, CO., LTD., et al.

Defendants.

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that plaintiff THOMAS MAHALEK, in the above-referenced case appeals to the Court of Appeals, Ninth Circuit, from the Amended Judgment on Jury Verdict filed March 9, 1995, and the Order granting defendant Korean Air Lines' Motion for Judgment as a Matter of Law, filed March 9, 1995.

NOTICE IS FURTHER GIVEN THAT plaintiff requests the Clerk of the above-entitled Court to prepare a Clerk's transcript and designate all papers and records on file or lodged with the Court in the above-entitled action.

Dated: March 21, 1995

BROWN, MONZIONE, FABBRO,
ZAKARIA & SCARLETT

By: RICHARD E. BROWN
RICHARD E. BROWN, ESQ.
Attorney for Plaintiff
THOMAS MAHALEK

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C-83-4381 WHO
Filed March 9, 1995

THOMAS L. MAHALEK, individually and as the heir of MURIEL KOLE,

Plaintiff,

—VS.—

KOREAN AIRLINES, CO., LTD.,

Defendant.

AMENDED JUDGMENT ON JURY VERDICT

This action having come on for trial before the Court and a jury, The Honorable William H. Orrick, District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict, and defendant Korean Airlines Co., Ltd. having filed a motion for judgment as a matter of law and plaintiff Thomas Mahalek having filed a motion for prejudgment interest and costs,

IT IS ORDERED AND ADJUDGED that:

1. The Judgment on Jury Verdict filed on October 29, 1994, is VACATED.

2. Defendant Korean Airlines Co., Ltd.'s motion for judgment as a matter of law is GRANTED.

3. Plaintiff Thomas Mahalek's motion for prejudment interest and costs is DENIED.

Dated: March 7, 1995.

/s/ WILLIAM H. ORRICK
William H. Orrick
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C-83-4381 WHO
Filed October 29, 1993

THOMAS L. MAHALEK, individually and as the heir of MURIEL KOLE,

Plaintiff,

—vs.—

KOREAN AIRLINES, CO., LTD.,

Defendant.

JUDGMENT ON JURY VERDICT

This action having come on for trial before the Court and a jury, The Honorable William H. Orrick, District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

IT IS ORDERED AND ADJUDGED that:

1. Plaintiff, Thomas L. Mahalek, suffered mental anguish and grief as a result of the death of Muriel Kole.

2. Plaintiff's mental anguish and grief did not result in actual mental injury accompanied by physical manifestations or aggravation of preexisting physical conditions that physically debilitated him with grief.

3. The amount of loss of love, affection and companionship that plaintiff has suffered (a) from September 1, 1983, to date of trial is $75,000; and (b) from date of trial forward is zero.

Dated: October 28, 1993.

/s/ WILLIAM H. ORRICK
William H. Orrick
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE WILLIAM H. ORRICK,
SENIOR JUDGE

No. C-83-4381 WHO

THOMAS L. MAHALEK, individually and as the heir of MURIEL KOLE,

Plaintiff,

—vs.—

KOREAN AIRLINES, CO., LTD.,

Defendant.

San Francisco, California
Monday, October 25, 1993
Tuesday, October 26, 1993

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

For Plaintiff: BELLI, BELLI, BROWN, MONZIONE, FABBRO & ZAKARIA
900 Montgomery Street
San Francisco, California 94133

By: RICHARD E. BROWN, ESQ.

For Defendant: CONDON & FORSYTH
1900 Avenue of the Stars
Suite 650
Los Angeles, California 90067

By: STEPHEN R. GINGER, ESQ.
GEORGE N. TOMPKINS, III, ESQ.

MAHALEK-REDIRECT\BROWN

Q. (By MR. GINGER) Mr. Mahalek, did you sister name you as a beneficiary in her will?

A. No, not that I know of.

Q. Isn't it correct, Mr. Mahalek, that at the time of your sister's death that she was not providing you with any financial support?

A. She was not providing me with financial support. We both had independent careers.

Q. Would it also be correct that at the time of your sister's death that you had no expectation of receiving financial support from her in the future?

A. No, I had no expectation. There was no need for any such expectation.

MR. GINGER: Thank you, your honor. Nothing further.

* * *

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C-83-4049 WHO
Filed August 13, 1993

MICHAEL KOLE,

Plaintiff,

—VS.—

KOREAN AIRLINES,

Defendant.

No. C-83-4381 WHO

THOMAS L. MAHALEK, individually and as the heir of MURIEL KOLE,

Plaintiff,

—VS.—

KOREAN AIRLINES, CO., LTD., a corporation,

Defendant.

ORDER

Good cause appearing therefor,

IT IS HEREBY ORDERED that:

1. The previous pretrial conference and trial dates are vacated.

2. Trial will commence in *Mahalek v. Korean Airlines*, No. C-83-4381 WHO, on October 25, 1993, at 8:30 a.m., and *Kole v. Korean Airlines*, No. C-83-4049 WHO will trail.

3. A pretrial conference will be held in both cases on October 14, 1993, at 2:00 p.m.

4. Defendant's motions for summary judgment and for determination of applicable damage law in *Kole v. Korean Airlines* are DENIED.

5. Defendant's motion for summary judgment in *Mahalek v. Korean Airlines* is DENIED.

Dated: August 12, 1993.

/s/ WILLIAM H. ORRICK
William H. Orrick
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE WILLIAM H. ORRICK,
SENIOR JUDGE

No. C-83-4049 WHO

MICHAEL KOLE, individually, and as the heir of MURIEL KOLE, deceased, and all other 269 passengers and crew members,

Plaintiffs,

—vs.—

KOREAN AIRLINES (a foreign corporation) and
UNION OF SOVIET SOCIALIST REPUBLICS (a foreign nation)

Defendants.

San Francisco, California
Thursday, August 5, 1993

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

For Plaintiff Kole: F. LEE BAILEY & AARON J. BRODER
350 Fifth Avenue—Suite 4710
New York, NY 10118

BY: KEVIN L. MOSLEY, ESQ.

For Plaintiff Mahalek:

BELLI, BELLI, BROWN, MONZIONE & FABBRO
574 Pacific Avenue
San Francisco, CA 94133

BY: RICHARD BROWN, ESQ.

For Defendant:

CONDON & FORSYTH
1251 Avenue of the Americas
New York, NY 10020

By: STEPHEN GINGER, ESQ.

* * *

THURSDAY, AUGUST 5, 1993

(TELEPHONE CONFERENCE CALL)

THE COURT: Hello. Gentlemen, will you please state your appearances.

MR. BROWN: Richard Brown, your honor, from Belli, Belli, Brown, Monzione & Fabbro, on behalf of the plaintiff, Thomas L. Mahalek, in Action Number C-83-4381.

MR. MOSLEY: Kevin Mosley from Bailey & Broder on behalf of the plaintiff, Michael Kole.

MR. GINGER: Good afternoon, your honor. Steven Ginger for Korean Air.

THE COURT: I have your memoranda, and I've decided on a good many of them before. So I'm simply going to give you my rulings.

In KAL's motion for summary judgment against Mahalek: First, he claims lack of standing under the DOHSA statute. I have already ruled on that December 23, 1992. And I ruled that Mrs. Mahalek had standing, despite the limitations of DOHSA, because the Warsaw Convention does not limit

recovery to the personal representative of the decedent, and it affirmatively provides for suit by persons other than passengers. That's at page 13 in my previous opinion. And that judgment collaterally estops KAL's motion for summary judgment in this case on the same grounds.

MR. BROWN: Your honor, that is also in accordance with Judge Motley's decision in 807 Fed.Supp. 1073 which arises out of the same facts.

THE COURT: And that analysis is equally applicable to Thomas Mahalek as it was to Michael Kole.

* * *

Relevant Provisions of The Warsaw Convention

Article 17

The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

49 Stat. 3018.

Article 24

1. In the cases covered by Articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this convention.

2. In the cases covered by Article 17 the provisions of the preceding paragraph shall also apply, without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights.

49 Stat. 3020.

Relevant Provisions of the Death on the High Seas Act, 46 U.S.C. § 761 *et seq.*

§ 761. Right of action; where and by whom brought

Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child or dependent relative against the vessel, person, or corporation which would have been liable if death had not ensued.

§ 762. Amount and apportionment of recovery

The recovery in such suit shall be a fair and just compensation for the pecuniary loss sustained by the persons for whose benefit the suit is brought and shall be apportioned among them by the court in proportion to the loss they may severally have suffered by reason of the death of the person by whose representative the suit is brought.